

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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IN RE ESTATE OF ERNEST JOHN JAMES  
FINK, Deceased.

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MICHAEL POST and STEVEN POST,

Appellants,

v

RICHARD SCHULTZ and MARIANNE  
TAYLOR, Co-Personal Representatives,

Appellees,

and

DALE TERMUNDE,

Appellee.

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UNPUBLISHED

July 24, 2008

No. 278266

Van Buren Probate Court

LC No. 2006-001118-DE

Before: Saad, C.J., Fort Hood and Borrello, JJ.

PER CURIAM.

Appellants, two of decedent's stepchildren, appeal as of right in their capacity as devisees under decedent's will from an opinion of the probate court determining heirs and/or devisees. For the reasons set forth in this opinion, we reverse and remand for entry of judgment in favor of appellants. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Decedent executed the will on April 27, 1990. At that time, decedent was married to appellants' mother, Della Fink, and left everything to Della should she survive him. The will further provided that if Della were to predecease decedent, appellants would have "the exclusive privilege of purchasing my farm and any and all farming tools and equipment for a price of double the state equalized valuation on said farm" and that they were to share the residue of decedent's estate with their brother, John Post. Decedent did not amend or revoke the will after his divorce from Della in 2001 or prior to his death on April 10, 2006. The farm referenced in the will was comprised of two parcels of real property with a state equalized value (as doubled

according to the will) of \$279,400 at the time of decedent's death. But the appraised value of the farm was purportedly \$729,725.

The probate court entered an order determining decedent's heirs and/or devisees and finding that the will was subject to MCL 700.2807, revoked all dispositive portions of the will with regard to appellants. This appeal ensued.

Factual findings of a probate court sitting without a jury are reviewed for clear error and the application of law to the facts is reviewed de novo. *In re Eggleston Estate*, 266 Mich App 105, 112; 698 NW2d 892 (2005). The resolution of this issue requires construing provisions of the Revised Probate Code (RPC) and the Estates and Protected Individuals Code (EPIC). The proper construction and application of a statute presents a question of law that this Court considers de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc.*, 468 Mich 29, 32; 658 NW2d 139 (2003).

Although the residuary clause in decedent's will also referenced appellants, only one dispositive provision in the will is at issue in this appeal. That provision, section three, paragraph (A) reads:

I give to my two stepsons: Steve Post . . . and Michael Post . . . the exclusive privilege of purchasing my farm and any and all farming tools and equipment for a price of double the state equalized valuation on said farm.

In revoking this provision, the trial court applied MCL 700.2807, which provides in relevant part:

(1) Except as provided by the express terms of a governing instrument, court order, or contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage does all of the following:

(a) Revokes all of the following that are revocable:

(i) A disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument and a disposition or appointment created by law or in a governing instrument *to a relative of the divorced individual's former spouse*. [Emphasis added.]

The RPC was enacted in 1979, MCL 700.991(1) (repealed by MCL 700.8102(c)), and was in effect when decedent executed his will in 1990. The RPC specified that, in the absence of an express provision stating otherwise, if a testator and his spouse divorced after the testator's will was executed, the testator's former spouse would be considered predeceased for the purpose of distributing the testator's property after his death. MCL 700.124(2) (repealed by MCL 700.8102(c)).

Although this provision of the RPC precluded a testator's former spouse from receiving distributions from his estate (in the absence of an express provision in his will to the contrary), it did not prevent the former spouse's relatives from receiving distributions from the testator's

estate pursuant to the terms of his will. Further, this provision required that “[p]roperty prevented from passing to a former spouse because of revocation by divorce passe[d] as if the former spouse failed to survive the [testator]...” MCL 700.124(2). Therefore, if the testator’s bequest to a former spouse’s relative was contingent on the testator surviving his spouse, the testator’s former spouse was considered predeceased under the RPC after she and the testator divorced, and the former spouse’s relative would automatically take pursuant to the terms of the testator’s will even if the former spouse was still alive.

In 2000, the Legislature repealed the RPC and adopted EPIC, MCL 700.8101(1); MCL 700.8102(c). EPIC expands the circumstances in which the subsequent divorce of a testator and his spouse affects bequests in the testator’s will. Specifically, MCL 700.2807 includes the following provision, which the trial court applied to decedent’s will in this case:

(1) Except as provided by the express terms of a governing instrument, court order, or contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage does all of the following:

(a) Revokes all of the following that are revocable:

(i) A disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument and a disposition or appointment created by law or in a governing instrument to a relative of the divorced individual’s former spouse.

MCL 700.2806 defines certain terms in MCL 700.2807(1)(a)(i) as follows:

(a) “Disposition or appointment of property” includes, but is not limited to, a transfer of an item of property or another benefit to a beneficiary designated in a governing instrument.<sup>[1]</sup>

\* \* \*

(d) “Governing instrument” means a governing instrument executed by a divorced individual before the divorce from, or annulment of his or her marriage to, his or her former spouse.

(e) “Relative of the divorced individual’s former spouse” means an individual who is related to the divorced individual’s former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

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<sup>1</sup> The will provision at issue confers upon appellants a substantial discount on the farm along with all of decedent’s farming tools and equipment and, thus, is the transfer of a benefit to a beneficiary designated in the will and constitutes a “disposition or appointment of property.”

Consequently, in the absence of express terms to the contrary in the governing instrument, when a testator who has executed a will subsequently divorces his spouse, the divorce revokes any disposition or appointment of property to either the former spouse or the former spouse's relatives.

The rules of statutory construction are as follows:

The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. [*Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001) (citations omitted).]

"Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *In re Smith Estate*, 252 Mich App 120, 124; 651 NW2d 153 (2002).

The Legislature's express intent in enacting EPIC was, in part, to provide a series of rules for interpreting the provisions of a will to ensure that the distribution of a testator's estate would correspond to his wishes. See MCL 700.1201(b). Further, in both the RPC and EPIC, the Legislature assumed that a testator who provided for a spouse in his will and later divorced his spouse would not want his former spouse to receive any portion of his estate, even if he did not revise his will after the divorce, and it adopted legislation preventing a former spouse from receiving a distribution from the testator's estate absent an express provision in the testator's will to the contrary. See MCL 700.124(2); MCL 700.2807(1)(a)(i). However, EPIC reflects an expanded policy determination. By also precluding the relatives of a testator's former spouse from taking under the testator's will (in the absence of an express provision in the will to the contrary), the Legislature obviously assumed that a testator who executed his will and subsequently divorced his spouse would not want his former spouse's relatives to receive distributions from his estate. See MCL 700.2807(1)(a)(i).

EPIC also retains the RPC provision permitting an alternate disposition of property "as provided by the express terms of a governing instrument." See MCL 700.2807(1). This means that if a testator decides that he wants his spouse's children or other relatives to receive distributions from his estate even if he were to divorce his spouse, he can include an express provision in his will specifying this intent. Presumably, a testator executing his will after EPIC took effect on April 1, 2000, would be aware of the default provisions of MCL 700.2807. *Adams Outdoor Advertising v East Lansing*, 463 Mich 17, 27; 614 NW2d 634 (2000).

EPIC, which took effect on April 1, 2000 (MCL 700.8101[1]), "applies to a governing instrument executed by a decedent dying after that date." MCL 700.8101(2)(a). However, MCL 700.8101(2)(e) provides the following caveat: "A rule of construction or presumption provided in this act applies to a governing instrument executed before that date unless there is a clear indication of a contrary intent." Although decedent died several years after EPIC took effect, he

executed his will and divorced Della before it took effect. Hence, the RPC governed the effect that his divorce would have on the subsequent distribution of his estate.

If MCL 700.8101(2)(a) alone governed, and if MCL 700.8101(2)(e) was not taken into consideration, EPIC would control the interpretation of decedent's will. Appellants are Della's children and are not related to decedent by blood, adoption, or affinity; therefore, they would be considered "relatives of the divorced individual's former spouse" pursuant to MCL 700.2806(e). Under MCL 700.2807(1)(a)(i), the right of appellants to take pursuant to the terms of decedent's will would be revoked.

However, MCL 700.2807(1)(a)(I) does not govern the revocation of provisions in decedent's will concerning the significantly discounted distribution of the farm, farming tools, and equipment, to Della's children. Because decedent's will was executed before EPIC was implemented in 2000, the rules of construction or presumption in EPIC apply to decedent's will "unless there is a clear indication of a contrary intent." MCL 700.8101(2)(e). In this instance, there existed a clear indication of decedent's contrary intent. Particularly, extrinsic evidence indicated that decedent wanted appellants to have the opportunity to acquire his farm when he died, irrespective of whether he was married to Della at the time.

Appellees' position presumes that MCL 700.2807(1) is a substantive rule of law. But the statute does not create, define, or regulate the rights of parties to recover from a testator's estate. Rather, the governing instrument executed by the testator governs the rights of parties to receive distributions from the testator's estate and the circumstances under which they may receive these distributions. We therefore conclude that MCL 700.2807(1) is a rule of construction. As such, the exception set forth in MCL 700.8101(2)(e) applies, and the trial court erred in its application of MCL 700.2807(1) when interpreting and implementing the provision of decedent's will at issue in this case.

Appellees' argue that the trial court was precluded from considering extrinsic evidence to determine if "a clear indication of a contrary intent" exists. However, MCL 700.8101(2)(e) does not require that a showing of contrary intent must be found in the governing document for the exception to apply. Nothing in MCL 700.8101 prevents a trial court from considering extrinsic evidence to determine whether a testator who executed his will before EPIC was implemented had an intent contrary to the presumption contained in EPIC.

"The role of the probate court is to ascertain and give effect to the intent of the testator as derived from the language of the will." *In re McPeak Estate*, 210 Mich App 410, 412; 534 NW2d 140 (1995). Accordingly, the testator's intent at the time he executed his will should be ascertained and carried out as nearly as possible. *In re Maloney Trust*, 423 Mich. 632, 639; 377 NW2d 791 (1985). "Absent an ambiguity, the court is to glean the testator's intent from the four corners of the testamentary instrument." *In re McPeak Estate*, *supra* at 412. However, if a document includes an ambiguity, "a court may establish intent by considering two outside sources: (1) surrounding circumstances, and (2) rules of construction." *In re Maloney Trust*, *supra* at 639, quoting *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983).

An ambiguity in a will may be patent or latent. *Thurston v Thurston*, 140 Mich App 150, 153; 363 NW2d 298 (1985). In this case, no patent ambiguity exists in the applicable provision of decedent's will. The will clearly indicates on its face that, at the time decedent executed it, he

wanted his wife, Della, to receive the remainder of his estate after his death and, if she did not survive him, he wanted appellants to receive the opportunity to acquire the farm, along with all the farming equipment and tools. Further, there was no latent ambiguity at the time decedent executed his will. Decedent indicated in his will that Della was his wife, that as his wife she would receive the remainder of his estate after his death pursuant to the terms of his will, and that appellants would receive the opportunity to acquire the farm if she did not survive him. Under the RPC, Della would have been treated as predeceased when she and decedent divorced and, as a result, appellants would have been afforded the opportunity to acquire the farm, along with the farming tools and equipment, pursuant to the terms of the will. Decedent did not include any provisions in the will indicating that his intent regarding the applicability of this provision to appellants in the event of his and Della's divorce was different from the default provisions set forth in the RPC. In other words, he did not indicate he did not want appellants to have the opportunity to acquire the farm after his death if he and Della were divorced when he died.

However, a latent ambiguity developed when MCL 700.2807 took effect. Although decedent's will was unambiguous on its face, extrinsic facts (decedent's divorce and the implementation of EPIC) created an ambiguity in the document. These circumstances, when considered in their totality, indicate that decedent would have had one of two possible intents as to whether appellants would still receive the opportunity to acquire the farm, tools, and equipment if he and Della divorced. Decedent could have intended that, consistent with the provisions of the RPC in effect at the time he executed his will, appellants were to have opportunity to acquire the real and personal property upon his death despite his divorce from Della. Alternatively, he could have simply wanted the provisions of the probate code in effect at the time of his death to govern whether appellants would inherit that part of his estate. Accordingly, a latent ambiguity in decedent's will existed, and the trial court improperly failed to consider extrinsic evidence to resolve this ambiguity and to determine decedent's intent at the time he executed the will. See *McCarty*, *supra* at 575.

Extrinsic evidence presented to the trial court indicated that decedent intended that appellants have the opportunity to acquire the farm, along with farming tools and equipment even though he and Della were divorced. Decedent's friends, neighbors, and business associates supplied the probate court with eleven affidavits attesting that decedent shared a long-standing close and personal relationship with appellants before, during, and after decedent's marriage to their mother. Notably, decedent routinely referred to appellants as "his boys" and felt that he had a father-son relationship with appellants. Appellant Michael Post testified that decedent lived with him for several months after the divorce and that decedent continued to spend most holidays at his house until his death.

In addition, the record shows that appellants worked for decedent, without pay, for thirty years commencing before the marriage and continuing after the divorce and until the time of decedent's death. The affidavits also resoundingly supported appellants' contention that despite the divorce from Della, decedent intended that appellants be afforded the opportunity to obtain the farm upon his death by way of the will.

This extrinsic evidence indicated that, from the time decedent executed his will until the time of his death, he had a relationship with appellants that was independent of his relationship with Della and that his relationship with appellants was unaffected by the divorce. Accordingly,

this evidence clarified the latent ambiguity in decedent's will and indicated that, consistent with the provisions of the RPC, decedent wanted appellants to have the opportunity to acquire the farm upon his death.

We therefore conclude that the trial court erred when it failed to consider the extrinsic evidence showing that decedent wanted appellants to have the opportunity to acquire the farm even though he and Della had divorced.

Reversed and remanded for entry of judgment in favor of appellants. We do not retain jurisdiction.

/s/ Henry William Saad  
/s/ Karen M. Fort Hood  
/s/ Stephen L. Borrello